

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC MAIL STATION

Nov 5 9 57 AM '04

Docket

In the Matter of)

Amendment of Section 73.202(b),)

Table of Allotments,)

FM Broadcast Stations.)

(Georgetown, Mason, Oxford and West Union,)

Ohio, and Salt Lick, Kentucky))

MB Docket No. 04-411

RM-11096

NOTICE OF PROPOSED RULE MAKING**Adopted: November 3, 2004****Released: November 5, 2004****Comment Date: December 27, 2004****Reply Comment Date: January 11, 2005**

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Petition for Rule Making jointly filed by Balogh Broadcasting Company, Inc. (Balogh Broadcasting'), licensee of FM Station WOXY, Channel 249A, Oxford, Ohio, Richard L. Plessinger, Sr. ("Plessinger"), licensee of FM Station WAXZ, Channel 249A, Georgetown, Ohio, and Dreamcatcher Communications, Inc., ("Dreamcatcher Communications"), licensee of FM Station WRAC, Channel 276A, West Union, Ohio (collectively "Joint Petitioners"). The Joint Petitioners request the reallocation of Channel 249A from Oxford to Mason, Ohio, as its first local service and modification of the Station WOXY license, reallocation of Channel 249A from Georgetown, Ohio to Salt Lick, Kentucky, as its first local service and modification of the Station WAXZ license. To prevent the removal of sole local service from Georgetown, the Joint Petitioners also propose the reallocation of Channel 276A from West Union to Georgetown, Ohio and modification of the Station WRAC license. The Joint Petitioners state their intentions to file the necessary applications and construct the facilities for proposed Channel 249A at Mason, proposed Channel 249A at Salt Lick, and proposed Channel 276A at Georgetown.

2. The Joint Petitioners filed its request pursuant to Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest in the proposed allotment.¹ When considering a reallocation proposal, a comparison is made between the existing allotment and the proposed allotment to determine whether the reallocation would result in a preferential arrangement of allotments based upon the FM Allotment priorities.²

3. The Joint Petitioners state that the proposed Mason reallocation for Station WOXY would result in a preferential arrangement of allotments because the proposed Channel 249A at Mason is mutually

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part 5 FCC Rcd 7394 (1990).

² The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)], See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1988).

exclusive with the current use of Channel 249A at Oxford and the reallocation would not deprive Oxford of its only local service since noncommercial FM Station WMUB is currently licensed at Oxford.³ Moreover, the establishment of first local service, priority (3), at Mason is preferred over the retention of second local service at Oxford, priority (4), other public interest matters.⁴ The proposed Mason reallocation would also result in a population net gain of 399,328 persons and provide a fifth aural service to 15 persons within the Station WOXY(FM) proposed 60 dBu contour, while the loss area would continue to receive at least 5 other aural services, thus considered well-served. A staff engineering analysis reveals that Channel 249A can be allotted to Mason in compliance with the Commission's spacing requirements provided there is a site restriction 9.4 kilometers (5.8 miles) east of Mason.⁵

4. The Joint Petitioners note that Mason is located inside the Cincinnati Urbanized Area and would place a 70 dBu contour over 12.8 percent of the urbanized area, whereas Oxford is not located in an urbanized area. Therefore, the proposed Mason reallocation implicates the Commission's policy regarding the migration of station into urban areas.⁶ In this regard, a rulemaking proponent must demonstrate that the intended city of license is sufficiently independent of the central city to justify a first local service preference. The Joint Petitioners have provided a *Tuck* showing demonstrating that Mason is sufficiently independent of the Cincinnati Urbanized Area to warrant a first local preference.

5. The proposed reallocation of Station WAXZ, Channel 249A to Salt Lick is mutually exclusive with the current use of Channel 249A at Georgetown and would not deprive Georgetown of its only local service since the proposal requests the reallocation of Station WRAC, Channel 276A from West Union to Georgetown. Additionally, the proposed Salt Lick reallocation would result in a preferential arrangement of allocations since it would provide Salt Lick with its first local service, priority (3), whereas a second local service at Oxford and West Union along with the retention of local service at Georgetown would result in other public interest matters, priority (4). Salt Lick is not located in an urbanized area and the proposed 70 dBu contour of Station WAXZ would not encompass more than 50 percent of an urbanized area. Therefore, a *Tuck* showing is not required since the proposed Salt Lick reallocation would not implicate the Commission's policy against migration of stations from rural to urban areas.⁷ Channel 249A can also be allotted to Salt Lick in compliance with the Commission's spacing requirements provided there is a site restriction 6.6 kilometers (4.1 miles) northeast of Salt Lick.⁸ The Joint Petitioners note that the relocation of Station WAXZ from Georgetown to Salt Lick would result in a population net loss of 36,904 persons. However, the entire loss area is considered well-served since Georgetown will continue to receive at least five other aural services.

³ Mason is an incorporated city located in Warren County with a 2000 U.S. Census population of 22,016 persons. Balogh Broadcasting states that Mason has its own local government and elected officials, schools, library, police and fire protection, health services, churches and numerous commercial establishments. Mason also has a weekly newspaper, *Pulse-Journal*. Mason has also its own zip code (45040) and the U.S. Postal Service maintains five post offices in this community.

⁴ *Id.* note 2.

⁵ The proposed reference coordinates for Channel 249A at Mason are 39-20-57 North Latitude and 84-12-08 West Longitude.

⁶ See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (M.M. Bur. 1995). See also, *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1998) ("*Tuck*") and *RKO General*, 5 FCC Rcd 3222 (1990) ("*KFRC*").

⁷ Salt Lick is an incorporated community located in Bath County with a 2000 U.S. Census population of 342 persons. Plessinger states that Salt Lick has its own post office and zip code (40371), elementary school, volunteer fire department, churches and a variety of businesses and commercial establishments.

⁸ The proposed reference coordinates for Channel 249A at Salt Lick are 38-10-15 North Latitude and 83-34-31 West Longitude.

6. The Joint Petitioners also propose the reallocation of Station WRAC(FM), Channel 276A from West Union to Georgetown, Ohio to replace the removal of Georgetown's sole existing local service. The proposed Georgetown reallocation is mutually exclusive with the current use of Channel 276A at West Union and would not deprive West Union of its only local service because noncommercial educational FM Station WVXW is currently licensed to West Union. Channel 276A can also be allotted to Georgetown in compliance with the Commission's spacing requirements provided there is a site restriction 12.1 kilometers (7.5 miles) east of Georgetown.⁹ The Joint Petitioners states that the proposed Georgetown reallocation would result in a population net gain of 14,512 persons within the proposed 60 dBu contour, while the loss area is well-served because it would receive service from at least five other aural services.

7. Based on the foregoing, we shall proposed the changes of community and modifications of the license for Station WOXY(FM) to Channel 249A at Mason, Ohio, Station WAXZ(FM) to Channel 249A at Salt Lick, Kentucky and Station WRAC(FM) to Channel 276A at Georgetown, Ohio. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest pertaining to the use of Channel 249A at Mason, Ohio, Channel 249A at Salt Lick, Kentucky and Channel 276A at Georgetown, Ohio.

8. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, 47 C.F.R. Section 73.202(b), with respect to communities, as follows:

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Georgetown, Ohio	249A	276A
Mason, Ohio	-----	249A
Oxford, Ohio	249A	-----
Salt Lick, Kentucky	-----	249A
West Union, Ohio	276A	-----

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required in paragraph 2 of the Appendix before a channel will be allotted.

10. Pursuant to 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before December 27, 2004, and reply comments on or before January 11, 2005, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served counsel for the petitioners, as follows:

⁹ The proposed reference coordinates for Channel 276A at Georgetown are 38-52-14 North Latitude and 83-45-55 West Longitude.

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11. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.¹⁰ This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

13. For further information concerning the proceeding listed above, contact Rolanda F. Smith, Media Bureau (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision in the applicable docket is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or any summary of any new information shall be served by the person making the presentation upon the other parties to the proceeding in particular docket unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be

¹⁰ See Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules. 46 FR 11549 (February 9, 1981).

considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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Attachment: Appendix

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), as set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments (*see* 47 C.F.R. Section 1.420(d).)

(b) Petitions for rule making which conflict with the proposals in this *Notice* will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; service. Pursuant to applicable procedures set out in 47 C.F.R. Sections 1.415 and 1.420, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments (*see* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.